UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

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Union)		
)		
BROTHERHOOD OF TEAMSTERS,)		
CONFERENCE, INTERNATIONAL)		
GRAPHIC COMMUNICATIONS)		
)		
)		
and)	Case:	31-CA-29253
)		
Employer,)		
,)		
d/b/a SANTA BARBARA NEWS-PRESS,)		
AMPERSAND PUBLISHING, LLP)		
)		

REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. <u>JURISDICTIONAL STATEMENT</u>

COMES NOW, Ampersand Publishing, LLC d/b/a Santa Barbara News-Press ("the News-Press"), the Respondent, pursuant to Section102.46(h) of the National Labor Relations Board's ("the Board" or "NLRB") Rules and Regulations, Series 8, as amended, with this Reply Brief in Support of Exceptions to the February 5, 2010 Decision and Recommended Order of Administrative Law Judge ("ALJ") Lana Parke in NLRB Case No. 31-CA-29253.

II. STATEMENT OF THE CASE

On March 19, 2010 the *News-Press* filed its Exceptions and Brief in Support of Exceptions. On or about March 31, 2010, the General Counsel electronically filed its Answering Brief with the Executive Secretary, and sent the Answering Brief via regular mail to the *News-Press*. This Reply Brief responds to the General Counsel's Answering Brief

III. ARGUMENT

A. THE FORM OF THE EXCEPTIONS AND BRIEF IN SUPPORT THEREOF COMPLIED WITH BOARD RULES.

The General Counsel exaggerated about the form of the *News-Press's* Exceptions and Brief in Support of Exceptions, going so far as to engage in an editorial critique of organization. The *News-Press* has no intention of bickering over the form of the Exceptions or Brief, short of stating that both comport with the letter and spirit of Section 102.46(c) of the Board's Rules and Regulations. The General Counsel had the option of filing a Motion to Strike, but declined. The General Counsel had no problem crafting arguments seeking to rebut the *News-Press's* Exceptions; clearly the General Counsel

understood the Exceptions. Evidently the form of the Exceptions was not to the General Counsel's personal tastes; for that the *News-Press* makes no apologies.

B. THE GENERAL COUNSEL'S EVIDENTIARY DISPUTES ARE WITHOUT MERIT

The General Counsel's contention about GC Exhibit 1(f) was not credible (GC Br. at 4-6). GC Ex 1(f) was part of the formal papers identified by the General Counsel and offered into evidence by the General Counsel at the hearing. (Tr. at 22). The record reflects:

JUDGE PARKE: Okay. Thank you very much. All right, General Counsel, are you ready to introduce the formal documents?

MS. SILVERMAN: Yes, Your Honor. I wish to offer into evidence the formal papers that have been marked for identification as General Counsel Exhibits 1(a) through 1(i), inclusive, Exhibit 1(i) being an Index and Description of the entire exhibit. I've already shown all parties the exhibit.

(General Counsel Exhibit 1(a) through 1(i), inclusive, marked for identification)

JUDGE PARKE: And are there any objections to the receipt of the formal documents?

MR. PLOSA: No, Your Honor, no objections.

JUDGE PARKE: They are received.

(General Counsel Exhibit 1(a) thorough 1(i), inclusive, received into evidence)

(Tr. 22)(bold in original). The General Counsel herself identified and offered GC Ex. 1(f) into evidence with no objection by the *News-Press*. The ALJ received the exhibit into evidence. An exhibit received into evidence is authenticated. The General

Counsel's argument that the Board should ignore the General Counsel's own exhibit is without precedent.

The *News-Press* made *one* reference to GC Ex. 30 in its Brief. (*N-P* Br. at 6). This, too, was an exhibit proffered by the General Counsel. The *News-Press* does not contend that GC Ex. 30 was admitted into evidence; however, it is part of the record pursuant to Section 102.45(b) of the Board's Rules and Regulations. The Board can attach whatever evidentiary value it wishes to it.

The duplicity of the General Counsel's arguments were that the General Counsel endorsed a strict application of the Federal Rules of Evidence with respect to its own exhibits, yet condemned a strict application of the same Federal Rules of Evidence with respect to waiver of privilege, the applicability of FRE 611(c) to Board proceedings, and the applicability of relevance with respect to subpoenaed documents. The General Counsel's actions constituted arbitrary and capricious agency action.

C. THE SUBPOENAS WERE A PROCEDURAL MATTER RESOLVED BY ALJ ANDERSON IN NLRB CASE NO. 31-CA-28589; THE MATTER IS MOOT

The General Counsel's Answering Brief contained no argument to rebut this contention. The General Counsel merely summarized ALJ Parke's ruling and advanced a tautology. (GC Br. at 21). The absence of contrary argument compels the Board to accept the *News-Press's* un-rebutted arguments.

D. THE ACT IS SUBSERVIENT TO THE CONSTITUTION

The General Counsel either did not understand or refused to acknowledge the *Noerr-Pennington* doctrine and adopted the ALJ's similar error. (GC Br. at 21-25). Brashly claiming that the *Noerr-Pennington* doctrine was "not applicable" because the

Board was not attempting to "enjoin or intervene in [the *News-Press's*] direct petitioning of the government" demonstrated a profound misunderstanding of the doctrine, or a deliberate indifference to this Constitutional construct. (GC Br. at 22). The Act is subservient to the Constitution. *See* U.S. Const. Art. V, Sec. 2. The Constitution's "Supremacy Clause" states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Agency must not ignore the Constitution; the Agency's agents, including the Region, General Counsel and ALJ, must do so as well. The Board must correct this constitutional error.

The hubris of the General Counsel was advanced in its Answering Brief:

In the instant matter, the Board did not attempt to enjoin Respondent's petitioning of the government through a lawsuit filed by Respondent. Rather, the Board was prosecuting Respondent in its own forum and it was in that forum that Respondent used the Board's processes, Board subpoenas, to violate employees' Section 7 rights.

(GC Br. at 23(emphasis added)). Such a limited reading of Constitutional rights expressly recognized by courts of law demonstrated a partisan agenda that did not effectuate the purposes of the Act. Attempting to minimize the Petition Clause to apply only in instances where the Agency intervenes or enjoins direct petitioning of the government in a judicial forum so narrows the issue as to evidence an intent to skirt the Constitution's requirements.

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¹ It goes without saying that it is the General Counsel, not the Board, which prosecutes any respondent. This error typified the blinding zeal with which the General Counsel and Region 31 prosecuted this case.

The General Counsel admitted that "its own forum" is a government forum. (GC Br. at 23). Yet, the General Counsel ignored the Supreme Court teaching of *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed. 2d. 642 (1972), that explained that "the right to petition *extends to all departments of the government* and that the right of access to the courts *is but one aspect* of the right of the petition." *Id.* at 510-11 (emphasis added). The General Counsel's contention that the rules in a Board proceeding are superior to the Constitution is intellectually arrogant and troubling in a democracy where the Constitution is the law of the land. The Agency must respect judicial interpretations of Constitutional doctrine; failure to do so is an affront to Constitutional checks and balances and reflects arbitrary and capricious agency action.

The General Counsel repeated this error with claims that a subpoena duces tecum "which requires the production of evidence in the possession of the subpoenaed individual, made the solicitation *ipso facto* involuntary [thus] inherently coercive in violation of Section 8(a)(1)." (GC Br. at 19) This contention cannot stand. The *News-Press* exercised a Constitutional right by petitioning the Board, pursuant to the Act, for the subpoenas. *See* 29 U.S.C. § 161(1). By the logic of the General Counsel any action – even constitutionally protected action – that "coerces" employees violates of the Act. The Supreme Court already rejected this notion in *B.E. & K. Constr. Co. v. NLRB*, 536 U.S. 516, 122 S.Ct. 2390, 153 L.Ed.2d 499 (2002), as well as *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983). Further, the General Counsel's argument extended to the conclusion that *any* Agency-related action, such as simply filing a charge, violates the Act.²

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² This would naturally include both CA and CB charges.

E. AN NLRB SUBPOENA IS NOT A SOLICITATION

The General Counsel again tried to re-frame the issue to suit a pre-determined violation of the Act. The parties stipulated that the only request by anyone from the *News-Press* for a personally possessed copy of an affidavit was in the form of the subpoena. (Tr. at 90). There was no solicitation by a manager or attorney of a *News-Press* employee for an affidavit during the Region's investigation. This fact was beyond cavil. Citations to *Inter-Disciplinary Advantage Inc.*, 349 NLRB 480, 505 (2007) — where a company attorney questioned an employee about statements given to a Board agent and requested a copy of an affidavit — represented an attempt to force a square peg through a round hole. (GC Br. at 18).

An NLRB subpoena is statutory. *See* 29 U.S.C. § 161(1)(... The Board, or any member thereof, *shall* upon application of any party to such proceedings, forthwith issue to such parties' subpoenas requiring the attendance and testimony of witnesses or the production of evidence in such proceeding ..."(emphasis added)). An NLRB subpoena is officially a Board document – not the document of a private litigant. *See* 29 U.S.C. § 161(2); *also see, Wilmot v. NLRB*, 403 F.2d 811, 815 (9th Cir. 1968). The ALJ – and the General Counsel in its Brief – refused to acknowledge the Act, in this regard.

F. ACCUSATIONS OF THREATS AND INTIMIDATION ARE FALSE AND WITHOUT EVIDENTIARY SUPPORT

The General Counsel cited *Conley Trucking*, 349 NLRB 308 (2007) for the proposition that the subpoenas in this case intimidated witnesses and/or constituted a threat. (GC Br. at 23-24). Again the General Counsel stretched a theory to suit a particular agenda.

Conley Trucking analyzed the propriety of accepting the affidavit contained in the investigatory file as substantive evidence, over contrary witness testimony, and the propriety of crediting the affidavits over the same contrary evidence. See 349 NLRB at 310. Conley Trucking had nothing to do with witness intimidation or threats, much less a subpoena. The cited language of Conley Trucking was ALJ dicta. (GC Br. at 23). Furthermore, Conley Trucking's reference to NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978), referred to a "concern over the potential for witness intimidation in Board litigation" in the context of "pretrial discovery in board proceedings." The instant facts are undeniably different.

The subpoenas at issue were not "pretrial discovery." An NLRB subpoena duces tecum requires production of documents at the commencement of (as opposed to in advance of) a hearing. *See* 29 C.F.R. § 102.31. Further, the *News-Press* petitioned for the subpoenas only *after* the Regional Director issued the complaint.

In the instant case, there was no evidence of intimidation.³ The complaint alleged only that the *News-Press* "interfere[ed] with, restrain[ed], and coerc[ed] employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act." (GC Ex. 1(g) at 3). There were no claims of threats or intimidation.

Further, the General Counsel ignored the fact that the *News-Press* and GCC/IBT attempted to resolve the subpoenas in advance of the hearing in NLRB Case No. 31-CA-28589 et al. The General Counsel knew of the *News-Press*'s clarifications of what the subpoenas requested. Both the *News-Press* and GCC/IBT copied the General Counsel on

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³ This even assumes that a subjective analysis, instead of an objective analysis, is appropriate. *Also see* Tr. 37-38.

the correspondence memorializing the attempts to resolve the subpoenas. (GC Ex. 1(f)[Internal Exhibits 1 and 2]). The General Counsel's assertion that the *News-Press* "did not formally amend its original subpoena duces tecum to clarify that it was not seeking the Board affidavits in the Region's investigatory file" (GC Br. at 13) was intellectually dishonest.

G. GENERAL COUNSEL EXAGGERATES FUTURE POTENTIAL CONDUCT SINCE THE ACT HAS BUILT-IN PROTECTIONS

The General Counsel made two sensational argument in its brief, namely that the *News-Press's* arguments meant that "Respondent could include language in its subpoena duces tecum that it would fire any employees who attend the hearing against it and such a statement would be protected ..." (GC Br. at 24), and that the *News-Press's* arguments "constituted an attempt ... to circumvent protections afforded to employees who cooperate in Board investigations (GC Br. at 14). Both arguments ignore the Act itself.

The first argument was specious. It supposed a subpoena compelled appearance and production, but also instructed that compliance would result in termination. As an initial matter, the *News-Press's* subpoenas contained no such language. Second, the Board has procedures to petition to revoke subpoenas and this hypothetical would certainly satisfy the standards necessary for revocation. Finally the subpoena in the hypothetical constituted a threat – which probably violated the Act. But, again, this hypothetical was markedly different from the instant case.

The second argument disqualified Section 8(a)(4) of the Act:

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer –

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

29 U.S.C. § 158(a)(4). Section 8(a)(4) squarely addresses the General Counsel's concerns about protections afforded to employees who cooperate in Agency investigations. It is important to recognize that at no time did the General Counsel ever allege a Section 8(a)(4) allegation. (Tr. at 16). The complaint should be dismissed.

IV. <u>CONCLUSION</u>

WHEREFORE, for the reasons stated in this Reply Brief, for the reasons stated in its Brief in Support of Exceptions, and for any additional reasons deemed appropriate by the Board, the *News-Press* respectfully requests that the Complaint in NLRB Case No. 31-CA-29253 be dismissed.

DATED: April 14, 2010

Santa Barbara, California

and

Nashville, Tennessee

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, certify that the foregoing REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE was filed electronically with the NLRB Executive Secretary on this 14th day of April, 2010, and also served on the following, via email:

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